In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WILLIAM ALBERT HARBISON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above cause on January 15, 1934, reversing the decision of the Board of Tax Appeals.

OPINION BELOW

The findings of fact and opinion of the Board of Tax Appeals (R. 38–44) are reported in 26 B.T.A. 896. The opinion of the Circuit Court of Appeals for the Second Circuit is not yet reported.

QUESTION PRESENTED

Where the taxpayer elects to be taxed under Section 101 (a) of the Revenue Act of 1928, does the basis for computing the 15% deduction allowable for contributions under Section 23 (n) of the Act include capital net gains or ordinary net income only?

STATEMENT

This case involves deficiencies in Federal income taxes for the year 1928 in the amount of $930.56. (R. 37.)

The facts as stipulated (R. 22–24) and found by the Board of Tax Appeals (R. 26–30) may be summarized as follows:

The taxpayer is a resident of White Plains, New York, and, during the taxable year 1928 had an "ordinary net income" of $66,634.87, as defined by Section 101 (c) of the Revenue Act of 1928, but without any allowance for deduction for contributions as provided by Section 23 (n) of the Revenue Act of 1928.

During the taxable year 1928, the taxpayer had a "capital net gain" of $45,013.52 (R. 43), as defined by Section 101 (c) of the Revenue Act of 1928, and elected to have this capital net gain taxed under the capital net gain provision, Section 101 (a) of the Revenue Act of 1928.

The total amount of contributions made during the taxable year 1928 by the taxpayer to organiza-

tions within the provisions of Section 23 (n) of the Revenue Act of 1928 was $27,996.83. (R. 44.)

The taxpayer claimed as a deduction for charitable contributions in his tax return so filed the sum of $16,747.26, being 15% of the sum of his "ordinary net income" and his "capital net gain."

The Commissioner of Internal Revenue in his amended answer (R. 21) took the position that the contribution deductions should be limited to $9,996.23 or 15% of the "ordinary net income", excluding "capital net gain." The Board of Tax Appeals sustained the Commissioner (R. 35–36) and determined a deficiency of $930.56 (R. 37). The Circuit Court of Appeals for the Second Circuit reversed, on the authority of *Susan Dwight Bliss* v. *Commissioner,* decided January 8, 1934, not yet reported. Judge Learned Hand dissented.

REASONS FOR GRANTING THE WRIT

The question here presented is identical with that presented in *Guy T. Helvering, Commissioner of Internal Revenue,* v. *Susan Dwight Bliss,* No. —, October Term, 1933, petition for a writ of certiorari in which case is being filed simultaneously herewith. For the reasons set forth in the Government's petition in that case, it is respectfully submitted that the petition here should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934